IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 1381/2002
Reserved on 25.4.2007
Date of decision 25.5.2007

Deepika Vashisht **…Petitioners.**

Versus

State of H.P. & others. **…Respondents**

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*.Yes*

For the petitioners : **Mr.Ajay Mohan Goel, Advocate.**

For the respondent No.1,2 & 4 : **Mr. M.S.Chandel, A.G. with Mr. M.A. Khan and Ms. Meenakashi, Dy. As, G.**

For the respondent No.3: **Mr. Balwant Kukreja, Advocate.**

Rajiv Sharma, J.

By way of this petition, the following reliefs have been sought for:-

"Declare the act of the respondent school of not promoting the staff of Primary School i.e. three JBT Teachers to the senior wing of the school, as per the orders of the respondent-State, and reflecting them as JBT Teachers, thus making petitioner surplus as seventh JBT teacher for a strength of 183 students in the Primary School and issuing her one month notice dated 19.8.2002 intimating her that her services are no more required from 19.9.2002 onwards without the prior approval of the Deputy Director of Education of the Zone as arbitrary, discriminatory, illegal and hence unconstitutional and quash the impugned order dated 19.8.2002.

---

[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? Yes.

Direct the respondent school not to terminate the services of the petitioner in the school as a JBT teacher pursuant to the impugned office order dated 19.8.2002.

Direct the respondents to produce before the Hon'ble Court the relevant record of the case and to pay to the petitioner the cost of the petition.

Any other relief which the Hon'ble Court deems fit may kindly be granted in favour of petitioner, in the interest of justice."

The necessary facts for the adjudication of the present petition are that the State of H.P. has framed the Rules called "the H.P. Non-Government Institution (Grant-in-Aid) Rules, 1997. As per appendix-II, the Himachal Pradesh Privately Managed Rules, 1987 have been framed separately. Rule 1 prescribes the minimum qualification for recruitment to the aided posts shall be the same as may be prescribed by the Government for similar category of posts in Government Institutions from time to time. Rule 2 provides that all appointments to the aided posts shall be made by the Managing Committee in the following manner:

"Appointing authority shall advertise in both English and Vernacular daily newspapers in the State, vacancy or vacancies to be filled in by giving full particulars thereof including the requisite qualifications, number of vacancies to be filled in and the last date by which the applications may be submitted; In the alternative the names of suitable candidates may be obtained through the employment exchange.

The recommendations for appointment of the candidates shall be made by a Sub-Committee consisting of five members of managing committee and a representative/nominee of H.P. Education Department.

The members of the sub-committee other than Departmental Nominee shall be appointed by the managing committee."

Rule 6 provides that subject to any rule that may be made in this behalf, no employee shall be dismissed, removed nor shall his services be

otherwise terminated except with the prior approval of the Deputy Director of the zone and any employee who is dismissed, removed or reduced in rank within a time scale may, within three months from the date of communication to him or the order of such dismissal, removal or reduction appeal against such order to the Director (Education) (Primary) to the Government of H.P. The order of Director has been made final.

In sequel to the H.P. State Privately Managed Recognised/Aided School Employees (Security of Service) Rules, 1997, the petitioner was appointed as JBT Teacher in the Primary Wing of respondent No.3 school on a fixed pay of Rs. 4550/- plus other allowances as applicable from time to time. This appointment has been made consequent upon the final clearance received under Shiksha-Shimla/Prathmik(2-4) (a)(1)2/96-II-5410-11 dated 30.8.2001 after her appointment had already been approved by the "Sub- Committee". The petitioner pursuant to order dated 1st September, 2001 started teaching in the Primary Wing of respondent No.3 school. It is pertinent to refer at this stage the communication dated 28.7.2000 and the relevant portion of the same is reproduced as under:

> **"On the subjection mentioned above, you are informed by way of appended letter of Director of Education No.EDN HP (5) (C) (10) 17/98 dated 29.8.1998 that the Grants Committee has decided that in your school the proposed posts of Shastri/Language Teachers/Physical Education teacher under the Grant In Aid will be filled from amongst the trained graduate teachers of your school as per seniority list sent to you vide this office letter No.Edu. Shimla (2) (B) (GIA) 11/97-23905-06 dated 19.6.98. Thus on the said posts adjustments are ordered as under:**

Sr.No.	Name of Teacher	Date of appointment/	Date of training	Posted as presently	Posted to the post of
1.	Nisha Sharma BA B.Ed.	Against JBT (Pry.)1.6.09/	20.3.89	Against JBT(Pry. wing)	Language teacher/Shastri. In High Wing

2.	**Kamlesh Bhandari B A B.Ed.**	**20.9.80/**	**15.9.89**	**Shastri in High wing.**	**Shastri/ Language teacher in middle wing.**
3.	**Girja Sharma B.A. B.Ed.**	**15.2.891/**	**19.9.90**	**Language teacher Middle wing.**	**PET in middle wing.**
4.	**Avinash Kaur B.Ed.**	**12.7.95/**	**4/82**	**PET inmiddle wing**	**JBT in Primary wing.**

You are requested to give effect to the above changes and intimate this office immediately and after the changes in case excess amount has been paid to any employee, recover the same and only then make payments to the employees."

It is evident from the reading of letter dated 28.7.2000 that one Nisha Sharma appointed against JBT post in primary wing was to be shifted to high wing. The petitioner's services were terminated vide memo dated 19th August, 2002 on the ground that the matter regarding her appointment as JBT Teacher was referred to the Director Primary Education for his approval/remittance under the grant-in-aid rules, but the approval/pay has been refused by the Director. The petitioner was relieved on 19.8.2002.

Mr. Ajay Mohan Goel, Advocate appearing on behalf of the petitioner has vehemently argued that the termination of the petitioner vide Annexure P-7 dated 19.8.20002 is arbitrary since no prior permission has been obtained as stipulated under rule 6(b) of the H.P. State Privately Managed Recognised/Aided School Employees (Security of Service) Rules, 1997. Mr. Ajay Mohal Goel then submitted that as per Grant-in-Aid Rules known as H.P. Non-Government Institution (Grant-in-Aid) Rules, 1997, it was the duty cast upon the respondent No.3 school to implement order dated 28.7.2000 in its entirety meaning thereby that one Ms. Nisha was to be posted in the High Wing resultantly making one vacancy available in the primary wing. He has also argued that besides Nisha

Sharma, two JBT Teachers, namely, Narender Kumar and Raj Sharma had been ordered to be posted/promoted to the High Wing by the respondent No.2 but the same has not been given effect to by the respondent No.3.

Mr. M.S. Chandel, learned Advocate General has stated that the grant-in-aid is released strictly as per the students- teachers ratio.

Mr. Balwant Kukreja, Advocate appearing on behalf of respondent No.3 has argued that the order of termination dated 19.8.2002 is in accordance with law. He has further argued that the termination of the petitioner is as per the condition No.7 of the appointment letter which stipulates that the appointment can be terminated at any time by one month notice from either side without assigning any reason.

I have heard the parties and perused the records.

It is evident from the reading of office order dated 1st September, 2001 that the petitioner's selection for the post of JBT Teacher had already been approved by the "Recruitment Committee" and the final clearance was received under letter dated 3.8.2001. In this view of the matter it was not permissible for the respondent No.3 school to terminate the services of the petitioner on 19th August, 2002. It is evident from rule 6(b) of the H.P. State Privately Managed Recognized/Aided School Employees (Security of Service) Rules, 1997 that before dismissal/ removal prior approval of the Deputy Director of Education is required. Admittedly, no prior approval has been sought by the respondent No.3 school before terminating the services of the petitioner and the same is thus bad in law. In view of the terms and conditions provided, all the teachers are to be regulated under H.P. State Privately Managed Recognised/Aided School Employees (Security of Service) Rules, 1997. The services of the petitioner could not have been terminated as per

clause 7 of the appointment letter as submitted by Mr. Ajay Mohan Goel. Even the termination letter Annexure P-7 dated 19th August, 2002 is couched in a very deceptive language. What is mentioned in the memorandum dated 19.8.2002 is that the matter regarding her appointment as JBT Teacher in the school was referred to the Director Primary Education for his approval/remittance of her pay under the Grant-in-Aid and the requisite approval/pay has been refused by the Director. The petitioner's appointment has already been approved by the competent authority vide letter Shiksha-Shimla/Prathmik(2-4) (a)(1)2/96-II-5410-11 dated 30.8.2001 after her selection was recommended by the "Sub-Committee". Thus, there was no legal compulsion for the respondent No.3 to seek fresh approval from the Directorate as far as the appointment of petitioner was concerned.

The matter is required to be looked into from another angle also. The Deputy Director had sent a direction to the respondent No.3 school on 28.7.2002. The contents of which have already been noted above, on the basis of which one Ms. Nisha Sharma was to be upgraded in High Wing from Primary Wing. The respondent No.3 school had not implemented the order of District Education Officer resulting in loss of one post in Primary Wing. Had Ms. Nisha Sharma been upgraded in High Wing, the petitioner could have always been accommodated against the 6th vacancy. It is a duty cast upon the respondent No.3 school to obey the directions issued by the Education Department as per the H.P. Non-Government Institution (Grant-in-Aid) Rules, 1997. It is stipulated in clause 'M' that the rules of the Department and directions as given by the Department from time to time so far as they are applicable to the aided schools are complied with. It is also provided under the rules that no grant will be given to the school not fulfilling the requirements quoted in the Rules. Surprisingly the

respondents-State has not taken any action for non-compliance of the directions issued by the District Education Officer to the respondent No.3 school on 28.7.2000. The non-implementation of the directions issued on 28th July, 2000 has prejudiced the petitioner as is evident from the proceedings of the meeting of the Grant in Aid Committee held on 26.4.2002. What is stated with regard to respondent No.3 school in the committee was that for the enrolment of 218 students 6 teachers were eligible for reimbursement of grant-in-aid whereas the management has claimed the grant in aid for 7 teachers. Consequently, the committee has not entertained the claim of 7th teacher i.e. petitioner. Had Ms. Nisha Sharma been shifted to High Wing, the petitioner could have been accommodated against the 6th posts resultantly becoming available. It is clarified that the appointment of the petitioner once approved by the competent authority was not dependent on the release of grant-in-aid. Respondent No.3 school had arbitrarily terminated the services of the petitioner after being appointed in accordance with law. It was nowhere mentioned in the appointment letter that her appointment was dependent on the release of grant-in-aid by the State. Similarly, communication dated 18th September, 2002 is illegal. No directive as mentioned in this memo dated 18th September, 2002 has been placed on record. The Directorate has only made observations to the effect that the committee did not entertain the claim of 7th teacher i.e. petitioner. This does not suggest that the Director has directed the termination of the petitioner as projected in memo dated 18th September, 2002.

Mr. Balwant Kukreja, Advocate appearing on behalf of respondent No.3 has also argued that the writ will not lie against the private school.

The respondent No.3-school is discharging the public functions and is also getting Grant-in-Aid from the State Government. Thus, the writ will

lie for enforcement of fundamental and legal rights against respondent No.3.

Hon'ble Supreme Court has held in ***Manmohan Singh V. Commissioner, U.T.*** AIR 1985 SCC 364 that the aided school receiving 95% of expenses by way of grant from the public exchequer and whose employees have received the statutory protection under the Act and which is subject to the regulations made by the Education Department of the union Territory of Chandigarh as also the appointment of Head Master to be valid must be approved by the Director of Public Instruction, would certainly be amenable to the jurisdiction of the High Court. Their Lordships of the Hon'ble Supreme Court have held as under:

> **"The High Court declined to grant any relief on the ground that an aided school is not other authority under Article 12 of the Constitution and is therefore not amenable to the writ jurisdiction of the High Court. The High Court clearly overlooked the point that Deputy Commissioner and Commissioner are statutory authorities operating under the 1969 Act. They are quasi-judicial authorities and that was not disputed. Therefore, they will be comprehended in the expression 'Tribunal as used in Article 227 of the Constitution which confers power of superintendence over all courts and tribunals by the High Court throughout the territory in relation to which it exercises jurisdiction. Obviously, therefore, the decision of the statutory quasi-judicial authorities which can be appropriately described as tribunal will be subject to judicial review namely a writ of certiorari by the High Court under Article 227 of the Constitution. The decision questioned before the High Court was of the Deputy Commissioner and the Commissioner exercising powers under S. 3 of the 1969 Act. And these statutory authorities are certainly amenable to the writ jurisdiction of the High Court.**
>
> **The matter can be viewed from a slightly different angle as well . After the decision of the Constitution Bench of this Court in Ajay Hasia V. Khalid Mujib Sehravardi, (1981) 2 SCR**

79: (AIR 1981 SC 487) the aided school receiving 95% of expenses by way of grant from the public exchequer and whose employees have received the statutory protection under the 1969. Act and who is subject to the regulations made by the Education Department of the Union Territory of Chandigarh as also the appointment of Headmaster to be valid must be approved by the Director of Public Instruction, would certainly be amenable to the writ jurisdiction of the High Court. The High Court unfortunately, did not even refer to the decision of the Constitution Bench in Ajay Hasia's case rendered on November 13, 1980 while disposing of the writ petition in 1983. In Ajay Hasia's case Bhagwati J; speaking for the Constitution Bench inter alia observed that 'the financial assistance of the State is so much as to meet almost entire expenditure of the corporation; it would afford some indication of the corporation being impregnated with governmental character.' Added to this 'the existence of deep and pervasive State control which may afford an indication that the Corporation is a State agency of instrumentality.' Substituting the words 'public trust' in place of the 'corporation' the reasons will mutatis mutandis apply to the school. Therefore, also the High Court was in error in holding that the third-respondent school was not amenable to the writ jurisdiction of the High Court."

The Hon'ble Supreme Court has held in ***Francis John Vs. Director of Education and other***s 1989 Supp (2) SCC 598 that any private school which receives aid from the Government under Grant-in-Aid Code cannot escape from the consequences flowing from the breach of the Code. Their Lordships of the Hon'ble Supreme Court have held as under:

"In the instant case also we are concerned with the Grant-in-aid Code. The decision which was challenged before the High Court was the order of the Director of Education dated July 12, 1984 which is fully extracted above. It is further seen that a copy of the above order has been communicated by the Director of Education not merely to the management of the school but also to the Zonal Officer, North Educational Zone, Mapsa and the Grant-in-aid Section

of the Directorate of Education. If the impugned orders of the Director of Education and of the Disputes Settlement Committee to which he had referred the case are set aside then the order of termination of service of the appellant, which receives aid from the government under the Grant-in-aid Code, which is promulgated not merely for the benefit of the management but also for the benefit of the employees in the school for whose salary and allowances the government was contributing from the public funds under the Grant-in-aid Code cannot escape from the consequences flowing from the breach of the Code and particularly where the Director of Education who is an instrumentality of the State is participating in the decision making process. Under these circumstances we find that the High Court was wrong in upholding that the orders of the Director of Education and of the Disputes Settlement Committee were not amenable to the jurisdiction of the High Court under Article 226 of the Constitution since the matter squarely falls within the principles laid down by this Court in Tikaram case."

The Hon'ble Supreme Court in ***Rajsoni V. Air Officer Incharge Administration***, (1990) 3 SCC 261 has held as under:

> **"The recognized private schools in Delhi whether aided or otherwise are governed by the provisions of the Act and the Rules. The respondent-management is under a statutory obligation to uniformly apply the provisions of the Act and the Rules to the techers employed in the school. When an authority is required to act in a particular manner under a statute it has no option but to follow the statue. The authority cannot defy the statute on the pretext that it is neither a State nor an "authority" under Article 12 of the Constitution of India."**

Similarly, the Hon'ble Supreme Court has held in ***K. Krishnamacharyulu and others V. Sri Venkateshwara Hindu College of Engineering and another*** (1997) 3 SCC 571 that when an element of public interest is created and the institution is catering to that element, the teacher, the arm of the institution is also entitled to avail of remedy

provided under Article 226. The Lordships of the Hon'ble Supreme Court have held as under:

> **"The admitted position is that the appellant and six others had been appointed on daily wages to the post of Lab Assistants as non-teaching staff of the respondent-private college. They were being paid daily wages. A writ petition and appeal seeking equal pay having been dismissed, they have filed the present appeal for direction to pay them equal pay for equal work on a par with the other government employees.**
>
> **It is not in dispute that executive instructions issued by the Government have given them the right to claim the pay scales so as to be on a par with the government employees. The question is when there are no statutory rules issued in that behalf, and the institution, at the relevant time, being not in receipt of any grants-in-aid; whether the writ petition under Article 226 of the Constitution is not maintainable? In view of the long line of decisions of this Court holding that when there is an interest created by the Government in an institution to impart education, which is a fundamental right of the citizens, the teachers who impart the education get an element of public interest in the performance of their duties. As a consequence, the element of public interest requires regulation of the conditions of service of those employees on par with government employees. In consequences, are they also not entitled to the parity of the pay scales as per the executive instructions of the Government? It is not also in dispute that all the persons who filed the writ petition along with the appellant had later withdrawn from the writ petition and thereafter the respondent-Management paid the salaries on a par with the government employees. Since the appellants are insisting upon enforcement of their right through the judicial pressure, they need and seek the protection of law. We are of the view that the State has obligation to provide facilities and opportunities to the people to avail of the right to education. The private institutions cater to the need of providing educational opportunities. The teacher duly appointed to a post in the private institution also is entitled to**

seek enforcement of the orders issued by the Government. The question is as to which forum one should approach. The High Court has held that the remedy is available under the Industrial Disputes Act. When an element of public interest is created and the institution is catering to that element, the teacher, being the arm of the institution, is also entitled to avail of the remedy provided under Article 226; the jurisdiction part is very wide. It would be a different position, if the remedy is a private law remedy. So, they cannot be denied the same benefit which is available to others. Accordingly, we hold that the writ petition is maintainable. They are entitled to equal pay so as to be on a par with government employees under Article 39 (d) of the Constitution."

In a recent pronouncement, the Hon'ble Court in ***Shivaji Shikshan Prasark Mandal and others Vs. State of Maharashtra and others*** (2005) 13 SCC 407 has held that the teachers of provide unaided school were entitled to revised pay scales and allowance on the basis of the recommendations of the Fifth Pay Commission. Their Lordships of the Hon'ble Supreme Court have held as under:

"Learned Senior Counsel appearing for the appellant Trust has contended that the Trust is not getting any aid from the Government and the teachers are not liable to be paid as per the government orders issued by the Government. It is contended that the Government order issued is not applicable to the unaided institutions. The Government order is produced as Annexure R-3 which says that keeping in view all the Central Government decisions about the Fifth Pay Commission recommendations Maharashtra State has appointed a Commission and that the revised pay scales will be implemented for the teachers and non-teaching staff of the government and non-government schools both primary/secondary/higher secondary and also teachers and non-teaching staff of the training colleges. It may also be noticed that under the Maharashtra Employees of Private Schools (Conditions of Service)Regulation Act, 1977, section 3 (1) says that the provisions of the Act shall apply to all

private schools in the State of Maharashtra, whether receiving any grant-in-aid from the State Government or not. Section 16 further states that the State Government may by notification in the Official Gazette, make rules for carrying out the purposes of this Act and Section 16 (2) (a) says that the State Government may by the Official Gazette prescribe minimum qualification for recruitment of employees of private schools (including its procedure); (b) their scales of pay and allowances. There is no dispute that these provisions of the Regulation Act are applicable to the appellant school. Learned Senior Counsel for the appellant contended that the appellant school is distinct as it is not receiving any aid. Even in the case of government order regarding pension, it is specifically stated that the government order is not applicable to the schools which are not getting aid from the Government. We do not think that the said government order has any application to the facts of this case. The Division Bench of the High Court was justified in holding that the appellant school was liable to pay the salary and allowances on the basis of the Fifth Pay Commission recommendations and are bound by Maharashtra Act 3 of 1978."

The contention of Mr. Kukreja that the petitioner could file appeal against her termination is also not sustainable. This petition has been entertained by this court on 23.9.2002 and was admitted for hearing on 1.1.2003. Once the petition has been entertained, admitted and pending for hearing for the last more than 4 years, the petitioner cannot be relegated to file an appeal at this stage.

The Hon'ble Supreme Court has held ***in U.P. State Vs. Mohd. Nooh AIR 1958 SC 86*** that there is no rule with regard to certiorari as there is mandamus that it will lie only where there is no equally effective remedy. Provided the requisite grounds exist, certiorari will lie although a right has been conferred by statute. The Hon'ble Supreme Court has opined as under:

"In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will be only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right has been conferred by statute, (Halsbury's Laws of England, 3rd Edn; Vol.ll, p. 130 and the cases citied there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. In the King Vs. Postmaster General; Ex parte Car-michael, 1928-1 KB 291 (E), a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of summary jurisdiction. The case of Rex v. Wandsworth Justices; Ex parte Read, 1942-1 KB 281 (F) is an authority in point. In that case a man had been convicted in a court summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction. At p. 284 Viscount Calde-cote, C.J; observed:

"It remains to consider the argument that the remedy of certiorari is not open to the applicant because others were available. It would be ludicrous in such a case as the present for the convicted person to ask for a case to be stated. It would mean asking this Court to consider as a question of law

whether justices were right in convicting a man without hearing his evidence. That is so extravagant an argument as not to merit a moment's consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, if in such circumstances as these, he preferred to apply for an order of certiorari to quash his conviction, the Court should be debarred from granting his application."

The Hon'ble Supreme Court has held in ***Baburam Vs. Zila Parishad, AIR 1969 Supreme Court 556*** that existence of alternative remedy is no bar to writ petition where it is alleged that Tribunal acted under provisions of law which was ultra virus or where it is alleged that it acted in violation of principle of natural justice. The Hon'ble Supreme Court has opined as under:

"It is a well established proposition of law that when an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, as observed by this Court in Rashid Ahmed Vs. Municipal Board, Kairana, 1950 SCR 566=(AIR 1950 SC 163), " the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefore. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self-imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari notwithstanding the fact that the statutory remedies have not been exhausted. In State of Uttar Pradesh Vs. Mohammad Nooh, 1958 SCR 595, 606= (AIR 1958 SC 86, 93), S.R. Dass, C.J; speaking for the Court, observed:

"In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will be only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right has been conferred by statute, (Halsbury's Laws of England, 3rd Edn; Vol.II, p. 130 and the cases citied there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted as a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. In the King Vs. Postmaster General; Ex parte Carmichael, 1928-1 KB 291 (E), a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of summary jurisdiction. The case of Rex v. Wandsworth Justices; Ex parte Read, 1942-1 KB 281 (F) is an authority in point. In that case a man had been convicted in a court of summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction.

There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs for

quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course."

The Hon'ble Supreme Court in ***Hirday Narain Vs. I.T.O. Bareily 1970 (2) SCC 355*** has held that the High Court would not be justified in dismissing as not maintainable the petition which was entertained and was heard on merits though the petitioner could file revision before the Commissioner of Income Tax.

"An order under section 35 of the Income Tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because on the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on merits.

The High Court observed that under Section 35 of the Indian Income-tax Act, 1922, the jurisdiction of the Income-tax Officer is discretionary. If thereby it is intended that the Income-tax Officer has discretion to exercise or not to exercise the power to rectify, that is in our Judgment erroneous. Section 35 enacts that the Commissioner or Appellate Assistant Commissioner or the Income-tax Officer may rectify any mistake apparent from the record. If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling

the Courts will readily infer a duty to exercise power which is invested in aid of 'enforcement of a right-pubic or private-of a citizen."

Similarly it has been held in ***Durlabhkumar V. Dist. Judge, Indore, AIR 1973 Madhya Pradesh 175*** that if a petition is heard on merit, the same cannot be rejected on the ground that the statutory remedy was not available. The Hon'ble Division Bench has opined as under:

"It was contended that as the alternative remedy of appeal, which was available to the petitioner, was not availed by him, relief under Article 226 of the Constitution could not be granted. In AIR 1971 SC 33, this question was considered by the Supreme Court and it was observed that-

An order under Section 35 of the Income-tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income-tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on merit."

In view of the matter, it would not be right to reject this petition at this stage. Shri Kohli, apearing for the respondent-Corporation, contended that in the Supreme Court case referred to above on the date, on which the writ petition was filed in the High Court a revision could be filed, and as the High Court admitted the petition the Supreme Court felt that thereafter the petition could not be dismissed on that ground alone. But according to the learned counsel, in the present case the time for appeal had already run out and, therefore, the

alternative remedy having not been availed of, this petition could not be entertained. It is no doubt true that the time provided for an appeal had run out when this petition was fi1ed. But if the petitioner had so chosen, he could have preferred an appeal and sought condonation. In that view view of the matter, the principles laid down by the Supreme Court will fully apply to the present case also, and no distinction can be drawn only on that ground. It appears that what the Supreme Court felt was that if at the time of motion hearing the petition had not been entertained, the petitioner could have sought the alternative remedy but that not having been done, after lapse of long time it would not be fit to refuse to grant relief as now it would not be possible for the petitioner to avail of the alternative remedy also. Apart from that, the question involved in the present case is about the jurisdiction of the District Judge and by refusing to investigate into the objections raised by the petitioner the District Judge had refused to exercise jurisdiction in him by law. Consequently this is a ground on which a petition under Article 226 or even under Art. 227 of the Constitution would be maintainable. Consequently the petition cannot also be thrown out on the objection of maintainability.

In **Malkhan Singh Vs. Union of India, 1981 (2) Labour Law Journal – 174** it has been held by the Hon'ble High Court of Judicature, Delhi that if the petition is admitted it should not be dismissed for the reasons that alternative remedy is available more particularly the petitioner had been pending for two years. Hon'ble High Court of Judicature, Delhi has opined as under:

"**Furthermore, "there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy": see State of U.P. V. Mohammad Nooh. (AIR 1958 SC.86). The existence of an alternative remedy is merely a factor to be taken into consideration and not a bar to relief. When there is "manifest error" or a "patent illegality" it is the duty of the High Court to interfere: see A.V. Venketeswaran, Collector of Customs,**

Bombay V. Ramchand Sobhraj Wadhwani and another, AIR 1961 SC 1506 and Hindustan Aluminum Corporation Ltd. V. Controller of Aluminum and others. ILR (1976) 1 Del. 336. Especially when quick relief is necessary; see Calcutta Companies District 1, Calculata and another AIR 1961 SC 372. And after admitting a petition for hearing on merits, it is not generally fair to dismiss it on this somewhat technical ground: see C.A. Abraham v. Income Tax Officer, Kottayam and another AIR 1961 SC 609 L. Hirday Narain v. Income Tax Officer, Bareilly, AIR 1971 SC 33 and the decision of a Division Bench of this Court in STR No.3 of 1973 entitled M/s Goodwill India Ltd. V. The State, decided on 20th April, 1979.

Now, applying these various propositions, how do the cases of the petitioners stand; At preliminary hearing, notice was issued to the respondents to show cause "why rule nisi be not issued". One of the preliminary objections raised in answer was that the petitioners had an equally efficacious alternative remedy open to them, under the Industrial Disputes Act and, hence, were not entitled to invoke the extraordinary jurisdiction of this Court under Article 226. Despite that objection, the petitions were admitted. It is reasonable to conclude that the objection, did not find favour with the admitting Bench. To allow this objection now after the petitions have been pending for two years, would clearly be most unjust. It may have been fair to turn away the petitioners at the threshold, but is different at this stage."

The Hon'ble Supreme Court in **Assam Sillimanite Ltd. V. Union of India (1990) 3 SCC 182** has held that pendency of the petition for considerable long period is also one of the exceptions for not directing the parties to avail the alternative remedy. The Hon'ble Supreme Court has held as under:

The next question is regarding the relief to be granted to the petitioner. Shri Datar submits that in the writ petition the only prayer made by the petitioners is for the quashing of the order dated December 7, 1972 and that no further claim has been made in the writ petition. He submits that if the petitioners are

aggrieved because of the premature termination of the leases, it is open to them to file a suit or take other appropriate remedies for obtaining compensation in respect of the unlawful termination. We do not think that this is a fair course to be adopted in this case. The writ petition was filed by the petitioner company as early as in February 1973 and has been pending in this Court for about 17 years. It is true that the petitioner could have filed a suit for the same purpose with a prayer for additional relief by way of compensation or damages. But we do not think that it should now be asked to go back to file a suit for compensation or damages which may be barred by limitation. After the lapse of such a long time, in our opinion, the proper course is to adopt some method for deciding the quantum of relief that could be granted to the petitioner by way of compensation and damages, which can at once be simple and expeditious and which will avoid further unnecessary litigation. We think that the request of the learned counsel that the matter may be referred to arbitration is a fair one and indeed this course is also not seriously resisted by the respondents. The short question that remains to be decided is whether the petitioners have suffered any damages as a result of the premature termination of the three leases in their favour either in the shape of loss of profits for the unexpired periods of the leases or in any other material respect. We, however, direct that, having regard to the circumstances of the case, the compensation/damages should be restricted to a period of five years from the date of termination of the leases or up to the date of expiry of the original lease deeds referred to above whichever is less and not for the entire unexpired period of all the leases. We refer this issue to arbitration."

The Hon'ble Supreme Court in ***S.J.S. Business Enterprises (P) Ltd. V. State of Bihar (2004) 7 Supreme Court Cases 166*** has held that existence of alternative remedy does not impinge on the jurisdiction of the High Court to hear the matter if it is otherwise possible. Hon'ble Supreme Court has opined as under:

"**The existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226. But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself if it is in a position to do so on the basis of the affidavits filed. If, however, a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the court to entertain the writ petition. The rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another court. But even when an alternative remedy has been availed of by a party but not pursued, the party could prosecute proceedings under Article 226 for the same relief. Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of, the Court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226. Therefore, the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits."**

The Hon'ble Supreme Court has held in ***Durga Enterprises (P) Ltd. And another V. Principal Secretary, Govt. of H.P. and others (2004) 13 Supreme Court Cases 665*** that High Court having entertained the writ petition in which the pleadings were also complete ought to have decided the case on merits instead of relegating the parties to a civil suit. Hon'ble Supreme Court has held as under:

"By the impugned order the writ petition, which was pending for a long period of thirteen years, has been summarily dismissed on the ground that there is remedy of civil suit. The dispute between the parties was concerning exercise of the respondents' alleged right of re-entry on the disputed property in accordance with sub-rules (2) and (3) of Rule 5 of the Land Acquisition (Companies) Rules, 1963. The aforesaid Rules contain a mechanism for adjudication of a dispute relating to

the alleged breach of terms of the agreement and the manner in which it is to be resolved.

The High Court, having entertained the writ petition, in which pleadings were also complete, ought to have decided the case on merits instead of relegating the parties to a civil suit.

We, therefore, set aside the impugned order of the High Court and remit the matter to it for taking a decision on merits, after hearing the parties, within the earliest possible period."

The upshot of the above discussion is that the termination of the petitioner vide Annexure P-7 dated 19th August, 2002 read with memo dated 18th September, 2002 is arbitrary and liable to be struck down. The respondent No.3 school has failed to implement the directions issued by the District Education Officer vide Annexure P-6 dated 28.7.2000. If the directive of the State had been implemented and Ms. Nisha Sharma shifted to High Wing, the petitioner could have been accommodated against the 6th vacancy.

Consequently the writ petition is allowed. Annexure P-7 dated 19.8.2002 and memo dated 18th September, 2002 are quashed and set aside. The respondent No.3 school is directed to re-instate the petitioner forthwith in the Primary Wing as JBT teacher with all consequential benefits i.e. arrears of salary, seniority etc. Respondent No.3 is further directed to release the salary of the petitioner within a period of three weeks from the date of receipt of copy of this judgment. The petitioner is also held entitled to costs which are quantified at Rs. 5,000/-.

(Rajiv Sharma), Judge

May 25, 2007
Awasthi